



## The Court finds several violations of the Convention and orders the immediate release of the opposition politician Mr Demirtaş

In today's **Grand Chamber** judgment<sup>1</sup> in the case of [Selahattin Demirtaş v. Turkey \(no. 2\)](#) (application no. 14305/17) the European Court of Human Rights held:

by sixteen votes to one, that there had been a **violation of Article 10 (freedom of expression)** of the European Convention on Human Rights;

by fifteen votes to two, that there had been a **violation of Article 5 § 1 (right to liberty and security)**;

by sixteen votes to one, that there had been a **violation of Article 5 § 3 (right to liberty and security)**;

by sixteen votes to one, that there had been **no violation of Article 5 § 4 (right to a speedy decision on the lawfulness of detention)**;

unanimously, that there had been a **violation of Article 3 of Protocol No. 1 (right to free elections)**;

by sixteen votes to one, that there had been a **violation of Article 18 (limitations on use of restrictions on rights) in conjunction with Article 5**; and

by fifteen votes to two, that **the respondent State was to take all necessary measures to secure the applicant's immediate release (Article 46 of the Convention)**.

The case concerned the arrest and pre-trial detention of Mr Selahattin Demirtaş, who at the time of the events was one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party.

The Court found in particular that the interferences with the applicant's exercise of his freedom of expression – namely the lifting of Mr Demirtaş's parliamentary immunity as a result of the constitutional amendment of 20 May 2016, his initial and continued pre-trial detention, and the criminal proceedings brought against him for terrorism-related offences on the basis of evidence comprising his political speeches – had not been prescribed by law within the meaning of Article 10 of the Convention. With regard to Article 5, no specific facts or information that could have given rise to a suspicion justifying the applicant's pre-trial detention had been put forward by the domestic courts at any time during his detention, and there had not therefore been a reasonable suspicion that he had committed the offences in question.

The same observations also led to a finding of a violation of Mr Demirtaş's right to be elected and to sit in Parliament. The Court found that the judicial authorities had not complied with their procedural obligation under Article 3 of Protocol No. 1 to ascertain whether or not Mr Demirtaş had been entitled to parliamentary immunity for the impugned statements. Nor had they weighed up the competing interests or taken account of the fact that Mr Demirtaş was one of the leaders of the political opposition in his country.

Lastly, the Court found it established that the applicant's detention, especially during two crucial campaigns relating to the referendum of 16 April 2017 and the presidential election of 24 June 2018, had pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which

1. Grand Chamber judgments are final (Article 44 of the Convention).

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was at the very core of the concept of a democratic society. The Court held that the respondent State was to take all necessary measures to secure the applicant's immediate release.

## Principal facts

The applicant, Mr Selahattin Demirtaş, is a Turkish national who was born in 1973. At the time of lodging his application he was detained in Edirne (Turkey).

At the time of the events, Mr Demirtaş was one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party. Between 2007 and 2018 he was a member of the Turkish Grand National Assembly ("the National Assembly"). He stood in the 2014 and 2018 presidential elections and received 9.76% and 8.32% of the vote respectively.

In September and October 2014, members of the armed terrorist organisation Daesh (Islamic State) launched an offensive on the Syrian town of Kobani, some 15 km from the Turkish border town of Suruç. Armed clashes took place between Daesh forces and the People's Protection Units (YPG), an organisation founded in Syria and regarded as a terrorist organisation by Turkey on account of its links with the PKK (Workers' Party of Kurdistan). Following the outbreak of the clashes in Syria, the Turkish government opened the country's borders to thousands of refugees who had gathered at the Turkish/Syrian border but closed the border in the direction of Syria in order to prevent volunteers from leaving to fight in Kobani.

From 2 October 2014 onwards, a large number of demonstrations were held across Turkey and several non-governmental organisations published statements calling for international solidarity with Kobani against the siege by Daesh. In particular, they urged the government to allow fighters to pass through to Syria. On 6 October 2014 three tweets calling for protests against the attacks by Daesh in Kobani and against the Turkish government were posted on the official HDP Twitter account.

From 6 October 2014 onwards, the demonstrations became violent, resulting in the death of 50 people and injuries to hundreds of others. According to public prosecutors, the violence had been prompted by the calls issued by the HDP Twitter account.

Towards the end of 2012, a peace process known as the "solution process" had been initiated with a view to finding a lasting, peaceful solution to the Kurdish question.

Parliamentary elections were held on 7 June 2015, and for the first time a pro-Kurdish party passed the threshold for representation in the National Assembly. The HDP received 13.12% of the vote and became the second-largest opposition party. The AKP (Justice and Development Party) lost its majority in Parliament for the first time since 2002.

In the months following the elections, Turkey was hit by a series of terrorist attacks, allegedly committed by the PKK and Daesh. The day after the 22 July 2015 terrorist attack, which resulted *de facto* in the end of the "solution process", armed clashes resumed between the security forces and the PKK. On 28 July 2015 the President of Turkey gave a statement to the press vowing that the HDP leaders would have to "pay the price" for the acts of terrorism.

Following the failure to form a coalition government, early elections were held on 1 November 2015, in which the HDP polled 10.76% of the vote. The AKP won the elections and regained its majority in the National Assembly.

On 20 May 2016 the National Assembly passed a constitutional amendment whereby parliamentary immunity was lifted in all cases where requests for the lifting of immunity had been transmitted to the National Assembly prior to the date of adoption of the amendment. The amendment affected a total of 154 members of parliament.

After the constitutional amendment had come into force, the Diyarbakır public prosecutor decided to join together 31 separate criminal investigations in respect of Mr Demirtaş as a single case. Between

July and October 2016 the competent public prosecutors issued six separate summonses for him to give evidence. However, Mr Demirtaş did not appear before the investigating authorities.

On 4 November 2016 the security forces carried out operations against twelve HDP members of parliament, including Mr Demirtaş, who were arrested and taken into police custody. Later that day the Diyarbakır 2nd Magistrate's Court ordered the pre-trial detention of Mr Demirtaş for membership of an armed terrorist organisation and public incitement to commit an offence. Eight other HDP members of parliament were placed in pre-trial detention by the competent magistrates in various towns.

From 8 November 2016 onwards Mr Demirtaş lodged several objections against his pre-trial detention. The domestic courts examined the matter of his detention more than sixty times. On each occasion until 2 September 2019, they ordered his continued detention.

On 2 February 2017 the Diyarbakır Assize Court accepted a bill of indictment filed by the public prosecutor, who had sought a sentence of between 43 and 142 years' imprisonment for the applicant, mainly for terrorism-related offences. On 22 March 2017 the Court of Cassation transferred the case to the Ankara Assize Court.

On 7 December 2017 the Ankara 19th Assize Court held its first hearing in the case. During the trial, Mr Demirtaş argued that he had been detained for expressing critical views about the policies pursued by the President of Turkey, and denied having committed any criminal offence. He maintained that his initial and continued pre-trial detention were unlawful. In particular, he asserted that the aim of depriving him of his liberty had been to silence members of the political opposition. He maintained that the accusations against him that had led to his pre-trial detention were linked to his political speeches, the contents of which were protected by the first paragraph of Article 83 of the Constitution.

In the meantime, the Istanbul public prosecutor's office had opened a criminal investigation in respect of Mr Demirtaş, who was accused of disseminating propaganda in favour of a terrorist organisation. At the end of those criminal proceedings, in a judgment of 7 September 2018 the Istanbul Assize Court sentenced him to four years and eight months' imprisonment for disseminating propaganda in favour of a terrorist organisation on account of a speech he had given at a rally in Istanbul on 17 March 2013. On 7 December 2018 Mr Demirtaş began serving his sentence of four years and eight months' imprisonment.

On 2 September 2019, in view the fact that Mr Demirtaş had finished filing his defence submissions, the Ankara Assize Court decided to release him from pre-trial detention on condition that he was not detained or convicted in separate proceedings. However, he remained in detention as a result of his conviction in the criminal proceedings in the Istanbul courts.

Following the decision of 2 September 2019 to release Mr Demirtaş, on 20 September 2019 the Istanbul 26th Assize Court ruled, further to an application by his lawyers, that the days he had spent in pre-trial detention should be deducted from the final sentence imposed by the Istanbul Assize Court. As a result of that decision, Mr Demirtaş should have been eligible for conditional release.

On the same day, the Ankara public prosecutor's office applied to the Ankara Magistrate's Court to have the applicant and Ms Figen Yüksekdağ (also a former co-chair of the HDP) placed in pre-trial detention in the context of a separate criminal investigation initiated in 2014 in relation to the events of 6 to 8 October 2014, on suspicion of offences including: undermining the unity and territorial integrity of the State; incitement to commit murder; and incitement to commit armed robbery in order to assist a criminal organisation. Later that day, the Ankara 1st Magistrate's Court ordered the pre-trial detention of Mr Demirtaş and Ms Yüksekdağ.

On 31 October 2019, further to a request by the applicant, the Istanbul Assize Court stayed the execution of his sentence of four years and eight months' imprisonment and ordered his release on

condition that he was not detained in separate proceedings. However, Mr Demirtaş remained in prison as a result of the order of 20 September 2019 for his pre-trial detention. The applicant is currently deprived of his liberty on the basis of that order alone.

Between 17 November 2016 and 11 December 2018 the applicant lodged several individual applications with the Constitutional Court.

On 21 December 2017 the Constitutional Court gave a first ruling concerning Mr Demirtaş's pre-trial detention, declaring his application inadmissible.

In a further judgment delivered on 9 June 2020 the Constitutional Court held, unanimously, that there had been a violation of Article 19 § 7 of the Constitution (corresponding to Article 5 § 3 of the Convention) on account of the length of time Mr Demirtaş had spent in pre-trial detention. It pointed out that it had previously found in its decision of 21 December 2017 that there had been a strong suspicion that an offence had been committed. However, examining the decisions ordering the continued detention of Mr Demirtaş in terms of the grounds for and proportionality of that measure, it concluded that the decisions to extend his detention had not contained relevant and sufficient reasons. In view of its finding of a violation, the Constitutional Court held that Mr Demirtaş was to be awarded 50,000 Turkish liras (approximately 6,500 euros) in respect of non-pecuniary damage.

As regards his current pre-trial detention, Mr Demirtaş has lodged a further application with the Constitutional Court, which is still pending before it.

## Complaints, procedure and composition of the Court

Relying on Article 10 of the Convention, the applicant complained of a violation of his right to freedom of expression. Under Article 5 §§ 1 and 3, he submitted that there had been no evidence giving rise to a reasonable suspicion that he had committed a criminal offence necessitating his pre-trial detention. He also alleged that the judicial decisions on his detention had been worded in abstract, repetitive and formulaic terms. Relying on Article 5 § 4, he submitted that the proceedings in the Constitutional Court had not complied with the requirements of the Convention and that the requirement of "speediness" had not been observed. The applicant complained that his pre-trial detention had also amounted to a violation of Article 3 of Protocol No. 1. In addition, relying on Article 18, he alleged that he had been detained for expressing critical opinions about the political authorities and that the purpose of his pre-trial detention had been to silence him.

The application was lodged with the European Court of Human Rights on 20 February 2017. A Chamber [judgment](#) was delivered on 20 November 2018. On 19 February 2019 the applicant and the Government each requested that the case be referred to the Grand Chamber under Article 43 of the Convention (referral to the Grand Chamber). On 18 March 2019 the panel of the Grand Chamber accepted their respective requests. A [hearing](#) was held on 18 September 2019.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Ksenija **Turković** (Croatia), *President*,  
Linos-Alexandre **Sicilianos** (Greece),  
Yonko **Grozev** (Bulgaria),  
Vincent A. **De Gaetano** (Malta),  
Helen **Keller** (Switzerland),  
Aleš **Pejchal** (the Czech Republic),  
Krzysztof **Wojtyczek** (Poland),  
Mārtiņš **Mits** (Latvia),  
Gabriele **Kucsko-Stadlmayer** (Austria),  
Alena **Poláčková** (Slovakia),  
Pauliine **Koskelo** (Finland),

Tim Eicke (the United Kingdom),  
Péter Paczolay (Hungary),  
Lado Chanturia (Georgia),  
Gilberto Felici (San Marino),  
Erik Wennerström (Sweden),  
Saadet Yüksel (Turkey),

and also Johan Callewaert, *Deputy Grand Chamber Registrar*.

## Decision of the Court

### Article 10

The Court's examination of this complaint focused on whether there had been a sufficient legal basis for the measures interfering with the exercise of the applicant's right to freedom of expression, namely the lifting of his parliamentary immunity as a result of the 20 May 2016 constitutional amendment, his initial and continued pre-trial detention, and the criminal proceedings brought against him on the basis of evidence comprising his political speeches.

The Court found that it had been the task of the national authorities, and in particular the domestic courts, to determine first of all whether the speeches on account of which the applicant had been charged and placed in pre-trial detention had been covered by parliamentary non-liability as provided for in the first paragraph of Article 83 of the Constitution. The applicant had argued from the start of his pre-trial detention that in the light of the first paragraph of Article 83, he could not be deprived of his liberty. However, that question had been disregarded by all the judges examining the lawfulness of his detention. Notwithstanding the safeguard enshrined in the first paragraph of Article 83 of the Constitution, the judicial authorities had placed the applicant in pre-trial detention and prosecuted him mainly on account of his political speeches, without any assessment of whether his statements were protected by parliamentary non-liability.

Moreover, the Court considered that the 20 May 2016 constitutional amendment in itself raised an issue in terms of foreseeability. It took the view that this had been a one-off *ad homines* amendment that was unprecedented in Turkish constitutional tradition, entailing a "misuse of the constitutional amendment procedure".

The Court found that the interference with the exercise of the applicant's freedom of expression had not satisfied the requirement of foreseeability, since in defending a political viewpoint, the applicant could legitimately have expected to enjoy the benefit of the constitutional legal framework in place, affording the protection of immunity for political speech and constitutional procedural safeguards.

Furthermore, the applicant's pre-trial detention had been ordered and extended, on the basis of his political speeches, for terrorism-related offences, in particular those provided for by Article 314 §§ 1 and 2 of the Criminal Code, namely forming or leading an armed terrorist organisation and membership of such an organisation. The political statements in which the applicant had expressed his opposition to certain government policies or the simple fact that he had taken part in the Democratic Society Congress – a lawful organisation – had been deemed sufficient to constitute acts that could establish an active link between the applicant and an armed organisation. In the Court's view, such a broad interpretation of a provision of criminal law could not be justified where it entailed equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link.

The Court concluded that there had been a violation of Article 10 of the Convention.

### Article 5 §§ 1 and 3

Having considered all the reasons put forward by the domestic courts, the Court found that none of the decisions on the applicant's initial and continued pre-trial detention contained evidence that could indicate a clear link between his actions – his political speeches and participation in certain lawful meetings – and the terrorism-related offences for which he had been detained.

The Government had not demonstrated that the evidence purportedly available to the Ankara Assize Court had met the standard of "reasonable suspicion" that was required by Article 5 of the Convention and could thus have satisfied an objective observer that the applicant might have committed the terrorism-related offences for which he had been detained. Not only had the charges against the applicant been based essentially on facts that could not be reasonably considered criminal conduct under domestic law; they had also related mainly to the exercise of his Convention rights.

The Court therefore concluded that there had been a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion that the applicant had committed an offence.

With regard to Article 5 § 3 of the Convention, the Court reiterated that the persistence of a reasonable suspicion that a detainee had committed an offence was a *sine qua non* for the validity of continued detention (see [Merabishvili v. Georgia](#), § 222). In the absence of such suspicion, the Court found that there had also been a violation of Article 5 § 3.

### Article 5 § 4

Subscribing to the reasoning and conclusion adopted by the Chamber, the Grand Chamber concluded there had been no violation of Article 5 § 4 of the Convention. The Chamber had found that the applicant's application to the Constitutional Court had been a complex one raising complicated issues concerning the pre-trial detention of a member of parliament whose parliamentary immunity had been lifted. It had also found it necessary to take into account the Constitutional Court's exceptional caseload following the declaration of the state of emergency in July 2016. Although the duration of thirteen months and four days before the Constitutional Court could not be described as "speedy" in an ordinary context, the Chamber had held that in the specific circumstances of the case, there had been no violation of Article 5 § 4 of the Convention.

### Article 3 of Protocol No. 1

The Court considered that its findings under Article 10 and Article 5 § 1 of the Convention were equally relevant for the purposes of Article 3 of Protocol No. 1.

The Court reiterated that parliamentary immunity was a privilege granted not to members of parliament on an individual basis but to the institution of Parliament, to guarantee its smooth operation. In that context, the domestic courts had to ensure that the member of parliament concerned was not entitled to parliamentary immunity in respect of the acts attributed to him or her. In the present case, although the applicant had asked the Assize Court to examine whether the impugned speeches were protected under the first paragraph of Article 83 of the Turkish Constitution, the domestic courts had not carried out any such examination, thus failing to comply with their procedural obligations under Article 3 of Protocol No. 1.

Where a member of parliament was deprived of his or her liberty, the judicial authorities ordering that measure were required to demonstrate that they had weighed up the competing interests. As part of this balancing exercise, they had to protect the freedom of the member of parliament concerned to express political opinions. In particular, they had to ensure that the alleged offence was not directly linked to his or her political activities. In addition, the member States' legal systems had to offer a remedy by which members of parliament who had been placed in detention could effectively challenge that measure and have their complaints examined on the merits. In the present case, the Government had been unable to show that the domestic courts with competence to review the

applicant's pre-trial detention had performed a balancing exercise from the standpoint of Article 3 of Protocol No. 1 when ruling on the lawfulness of his initial and continued pre-trial detention. The Constitutional Court had not examined whether the offences in question were directly linked to the applicant's political activities.

The Court concluded that the judicial authorities had not taken effective account of the fact that the applicant was not only a member of parliament but also one of the leaders of the political opposition in Turkey, whose performance of his parliamentary duties called for a high level of protection.

Furthermore, the reasons why the imposition of an alternative measure to detention would have been insufficient in the applicant's particular case had not been explained by the first-instance courts.

Although the applicant had retained his status as a member of parliament throughout his term of office, the fact that it had been effectively impossible for him to take part in the activities of the National Assembly on account of his pre-trial detention constituted an unjustified interference with the free expression of the opinion of the people and with his own right to be elected and to sit in Parliament. The Court therefore concluded that the applicant's pre-trial detention had been incompatible with the very essence of his right under Article 3 of Protocol No. 1 to be elected and to sit in Parliament.

There had therefore been a violation of Article 3 of Protocol No. 1 to the Convention.

#### Article 18 in conjunction with Article 5

The Court noted firstly that even before 2014, public prosecutors had submitted several investigation reports in respect of the applicant to the National Assembly. Until the onset of the political tension between, on the one hand, the HDP and, on the other, the President and the ruling party, the applicant had not been at risk of being deprived of his liberty. However, from the end of the "solution process", and after the speeches by the President – who had, for example, said in July 2015 that "the leaders of that party [the HDP] must pay the price" – there had been an increase in the number and pace of the criminal investigations in respect of the applicant. The constitutional amendment adopted on 20 May 2016 had lifted the parliamentary inviolability of 154 members of parliament, and 14 of them from the applicant's party, including both of its co-chairs, had been placed in pre-trial detention. The Government had been unable to show that any members of parliament belonging to the bloc of the ruling parties, namely the AKP and the MHP, had also been convicted and/or deprived of their liberty. Members representing the opposition parties, namely the CHP and the HDP, had been the only ones to have been detained and/or convicted following the institution of criminal proceedings against them.

The Court attached considerable weight to the observations of the intervening third parties, and in particular the Council of Europe Commissioner for Human Rights, who had indicated that national laws were increasingly being used to silence dissenting voices. The Court thus found that the decisions on the applicant's initial and continued pre-trial detention were not an isolated example. On the contrary, they seemed to follow a certain pattern.

The Court notes that the applicant had in particular been deprived of his liberty during two crucial campaigns, that of the referendum of 16 April 2017 and that of the presidential election of 24 June 2018. In the Court's view, his pre-trial detention had undoubtedly prevented him from contributing effectively to the campaign against the introduction of a presidential system in Turkey. Moreover, it was apparent that the applicant's political opponents had taken advantage of the fact that he had had to conduct his election campaign from prison.

Noting the closeness in time of the applicant's release from detention, ordered by the Ankara Assize Court on 2 September 2019, the Istanbul 26th Assize Court's decision of 20 September 2019, the applicant's immediate return to pre-trial detention on the same day and the speech given by the President immediately afterwards, the Court was of the view that the domestic authorities did not



appear to be interested in the applicant's suspected involvement in an offence allegedly committed between 6 and 8 October 2014, some five years previously, but rather in keeping him detained, thereby preventing him from carrying out his political activities.

The Court also took note of the findings of the Venice Commission on the independence of the judicial system in Turkey, and more specifically those concerning the Supreme Council of Judges and Prosecutors. In its opinion no. 875/2017 on amendments to the Constitution, the Venice Commission had expressed the view that the proposed new composition of the Supreme Council was "extremely problematic" and would seriously endanger the independence of the judiciary. In the Court's view, the reports and opinions by international observers, in particular the comments by the Commissioner for Human Rights, indicated that the tense political climate in Turkey during recent years had created an environment capable of influencing certain decisions by the national courts, particularly during the state of emergency, when hundreds of judges had been dismissed, and especially in relation to criminal proceedings instituted against dissenters.

In the Court's opinion, the concordant inferences drawn from this background confirmed the view that the judicial authorities had reacted harshly to the applicant's conduct as one of the leaders of the opposition, to the conduct of other HDP members of parliament and elected mayors, and to dissenting voices more generally. The applicant's initial and continued pre-trial detention had not only deprived thousands of voters of representation in the National Assembly, but had also sent a dangerous message to the entire population, significantly reducing the scope of free democratic debate. The Court thus concluded that the reasons put forward by the authorities for the applicant's pre-trial detention had merely been cover for an ulterior political purpose, which was a matter of indisputable gravity for democracy. It found that it had been established beyond reasonable doubt that the applicant's detention, especially during two crucial campaigns relating to the referendum of 16 April 2017 and the presidential election of 24 June 2018, had pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which was at the very core of the concept of a democratic society.

There had therefore been a violation of Article 18 of the Convention in conjunction with Article 5.

#### Article 46

The applicant had been placed in pre-trial detention on the basis of a new legal classification of the "acts and incidents" relating to the period of 6-8 October 2014 that had also formed part of the grounds relied on to justify the specific deprivation of liberty raised in his application, which had ended on 2 September 2019.

The continuation of the applicant's pre-trial detention, on grounds pertaining to the same factual context, would entail a prolongation of the violation of his rights as well as a breach of the obligation on the respondent State to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention. Accordingly, the Court held that the respondent State was to take all necessary measures to secure the applicant's immediate release.

#### Just satisfaction (Article 41)

The Court held that Turkey was to pay the applicant 3,500 euros (EUR) in respect of pecuniary damage, EUR 25,000 in respect of non-pecuniary damage and EUR 31,900 in respect of costs and expenses.

#### Separate opinions

Judges Wojtyczek and Yüksel each expressed a partly concurring and partly dissenting opinion. Judge Chanturia expressed a partly dissenting opinion. Judge Yüksel joined by Judge Paczolay expressed a further partly dissenting opinion. These opinions are annexed to the judgment.



*The judgment is available in English and French.*

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